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No. 88-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALASKA,

Petitioner,

v.

KENAITZE INDIAN TRIBE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

*CAROL H. DANIEL
TRED R. EYERLY
WILLIAM E. CALDWELL

Alaska Legal Services Corporation
1016 West Sixth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-6282

Attorneys for Respondent

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Section 804 of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) provides that the taking of fish and wildlife "for nonwasteful subsistence uses shall be accorded priority over the taking. . . of fish and wildlife for other purposes." 16 U.S.C. § 3114. Section 803 describes who is entitled to the priority by defining "subsistence uses" as the "customary and traditional uses by *rural Alaska residents* of wild, renewable resources" for a variety of uses. 16 U.S.C. § 3113 (emphasis added).

The sole question presented by this case is whether the term "rural" should be given its plain and ordinary meaning.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Kenaitze Indian Tribe respectfully requests the Court to deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 860 F.2d 312 (1989), and is reproduced in Pet. App. A-1 - A-23. The Court of Appeals rejected a suggestion for rehearing *en banc*, with no judge requesting a vote. Pet. App. A-2. After the denial of stay applications by the Court of Appeals and this Court, the district court entered a preliminary injunction on April 25, 1989, which is reproduced in the appendix to this opposition. App. 1a-10a.

STATEMENT OF THE CASE

The Kenaitze Indian Tribe brought this action pursuant to § 807 of the Alaska National Interest Lands

Conservation Act (ANILCA)[1], 16 U.S.C. § 3117, to prevent the State of Alaska from denying its members the federal statutory protections for subsistence hunting and fishing guaranteed all "rural Alaska residents." Sections 803 and 804 of ANILCA provide that "rural Alaska residents" engaged in customary and traditional harvests of fish and game are entitled to a priority over all other competing users. The controversy in the courts below centered upon the meaning of the word "rural" in § 803 of ANILCA.

As their name suggests, members of the Kenaitze Indian Tribe have lived for centuries on the Kenai Peninsula along the coast of Cook Inlet in southcentral Alaska. For most of their history they have pursued a way of life centered upon subsistence hunting and fishing. In recognition that subsistence activities are essential to the continued physical, economic, traditional and cultural existence of Alaska Natives, Congress has provided statutory protections for those uses of fish and wildlife since territorial days. *See, e.g.*, Act of June 13, 1902, 32 Stat. 327; Act of May 11, 1908, 35 Stat. 102; Act of January 13, 1925, 43 Stat. 739, 744. Adhering to this policy when Alaska became a state in 1959, Congress conditioned statehood on the State's agreement not to curtail or interfere with aboriginal hunting and fishing rights. Act of July 7, 1958, § 4, 72 Stat. 339.

Statehood did not, however, leave the subsistence uses of Alaska Natives unaffected. State regulatory restrictions on all Native subsistence harvests, including those of the respondent Tribe, proliferated

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[1] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. §§ 3111-3126.

after the responsibility for managing fish and game was transferred from the federal government to the State. These restrictions were imposed by regulatory bodies which were dominated by urban sport and commercial interests.[2] Controlled by these interests, the State regulatory system favored sport and commercial hunting and fishing, and was insensitive and unsympathetic to Native subsistence uses. "Indeed, the latter was substantially ignored by the State of Alaska for many years." App. 2a-3a.[3]

Congress attempted to assuage and reverse this treatment of subsistence users when it passed the Alaska Native Claims Settlement Act ("Settlement Act") in 1971,[4] but neither the Secretary of the In-

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[2] As one commentator aptly put it, "it was a fact of Alaska political life that the state's Department of Fish and Game was dominated by non-Native urban, sports and commercial hunting [and] fishing interests." D. CASE, ALASKA NATIVES AND AMERICAN LAWS 296 (1984) (hereinafter CASE). *Accord*, 126 CONG. REC. 29,279 (1980) (Congressman Udall) (State "regulatory system . . . subordinated subsistence uses to the needs of urban sport hunters").

[3] In the decision below, the Court of Appeals concluded that the State's "creative redefinition of the word rural" had the "transparent purpose . . . to protect commercial and sport fishing interests." Pet. App. A-16. On remand, the district court drew a similar conclusion from the State's opposition to preliminary injunctive relief: "The State's arguments of severe economic consequences to those dependent upon the sport fishery on the Kenai Peninsula for their livelihood are, in a way, proof of the Ninth Circuit's accusation that the State's priorities have not been where they should have been under both state and federal law." App. 6a.

[4] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, *codified at* 43 U.S.C. §§ 1601-28. The Settlement Act was in-

terior nor the State moved to protect the subsistence needs of Alaska Natives.[5] This lack of action was nowhere more evident than on the Kenai Peninsula. For example, although the Cook Inlet subsistence salmon harvests consisted of less than one-half of one percent of the total average annual Kenai Peninsula harvest of over four million fish,[6] the State aggressively sought to increase the 99.5% share of the har-

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tended to settle the aboriginal land claims of Alaska Native Tribes. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). While Congress extinguished the aboriginal hunting and fishing rights in addition to the right of occupancy upon which the claims were based, 43 U.S.C. § 1603, it did so only after directing the Secretary of the Interior and the State of Alaska to "take any action necessary to protect the subsistence needs of the Natives." H. CONF. REP. NO 92-746, 92d Cong., 1st Sess., 37, *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 2247, 2250 (emphasis added).

[5] CASE, *supra* n. 2, at 295. "[S]ome nine years later it was compellingly clear that neither the state nor the secretary were likely to protect subsistence in the manner Congress had contemplated. Neither the secretary nor the state had withdrawn any lands for subsistence uses, let alone established any sort of hunting and fishing preferences to limit *nonresident* access to resources needed by *local* subsistence users." *Id.* (emphasis in original). *See also* 126 CONG. REC. 29,278 (1980) (Congressman Udall) ("[N]either the Secretary nor the State of Alaska made sufficient effort to abide by the direction of the Conference Committee").

[6] S. BRAUND, COOK INLET SUBSISTENCE SALMON FISHERY, Alaska Department of Fish and Game Technical Paper No. 54 (1982) (CR 4, Exhibit 8) at 33. Braund's study compares commercial, sport and subsistence harvests in Upper Cook Inlet (which embraces the Kenai Peninsula). For the years 1977 through 1980, the percentage of the Upper Cook Inlet salmon harvest attributable to subsistence fishermen constituted only .008 percent in 1977, .07 percent in 1978, .47 percent in 1979, and .33 percent in 1980.

vest allocated to urban sport and commercial fishers.[7] The State prohibited subsistence fishing during the months of May, June and July, restricted subsistence fishing during the months of August and September to twelve hours per week, restricted the size of the nets which could be used to subsistence fish, lowered the yearly catch limit per head of household, and closed the best subsistence fishing spots, leaving the Kenaitze six miles of inaccessible, boulder-strewn beach on which to fish.[8]

This hostility to subsistence uses, evidenced by the onerous regulation on the Kenai Peninsula as well as elsewhere throughout the State, led to the passage of Title VIII of ANILCA in 1980. 16 U.S.C. §§ 3111-26. A "treaty substitute,"[9] Title VIII implements Congress' long-standing concern for, and obligation to protect, subsistence uses of Alaska Natives, and serves to fulfill the purposes of the Alaska Native Claims Settlement Act. 16 U.S.C. § 3111(4). Title VIII expresses an overriding congressional policy of protecting the subsistence rights of Alaska Natives.[10]

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[7] In 1977, without regard to subsistence fishing needs, the Board of Fisheries adopted a comprehensive management policy for Cook Inlet. 5 ALASKA ADMIN. CODE § 21.363. The policy basically allocated specific salmon stocks to sport or commercial fishermen on the basis of seasonal fish movements. *See Kenai Peninsula Fisherman's Cooperative Ass'n v. State*, 628 P.2d 897, 899-901 (Alaska 1981).

[8] BRAUND (CR 4, Exhibit 8) at 23-27.

[9] *See* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW at 8 (1987).

[10] Although the principal impetus for Congress' passage of Title VIII was its commitment to protect the subsistence rights of Alaska Natives, at the behest of the State of Alaska, the

Congress prefaced Title VIII with a declaration that "the continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional and cultural existence . . . ." 16 U.S.C. § 3111(1). Congress further found that because "continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, . . . [and] by increased accessibility of remote areas containing subsistence resources," 16 U.S.C. § 3111(3), it was necessary and in the national interest "to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4), (5).

To achieve these ends, Congress provided that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. It defined "sub-

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statute was drafted broadly to protect all subsistence lifestyles in rural Alaska. Pet. App. 4-A, n. 1. *Accord* 16 U.S.C. § 3111(1). The Senate committee explained:

> The Committee notes that the Alaska Native people have been living a subsistence way of life for thousands of years, and that the Alaska Native way of life in rural Alaska may be the last major remnant of the subsistence culture alive today in North America. In addition, there is also a significant non-Native population residing in rural Alaska which in recent times has developed a subsistence lifestyle that also is a cultural value.

S. REP. NO. 96-413, 96th Cong., 1st Sess. 168-69 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5070, 5112-13 (hereinafter S. REP. NO. 96-413).

sistence uses" as "the customary and traditional uses by *rural Alaska residents* of wild, renewable resources" for a variety of purposes. 16 U.S.C. § 3113 (emphasis added). Finally, Congress created a program of cooperative federalism in which it directed the Secretary of the Interior to establish the administrative structure necessary for implementation of the statutory priority on federal lands and waters,[11] 16 U.S.C. § 3115(a)-(c), and then offered back to the State the opportunity to retain management authority over fish and wildlife on all federal lands and waters if the State adopted the federal policy of protecting subsistence uses by "enact[ing] and implement[ing] laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title." 16 U.S.C. § 3115(d). By virtue of § 807, the federal courts were entrusted with the duty of enforcing (against either the Secretary or the State, as the case might be) the priority policy prescribed by Congress.[12] 16 U.S.C. § 3117.

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[11] The federal government owns over 60% of the land in the State of Alaska. INSTITUTE FOR SOCIAL AND ECONOMIC RESEARCH, CHANGING OWNERSHIP AND MANAGEMENT OF ALASKA LANDS, Vol. XXII, No. 2, Alaska Review of Social and Economic Conditions (October 1985). This land is held in the form of National Wildlife Refuges, Parks, Preserves, Monuments, Conservation Areas, Recreation Areas, and Forests, as well as military properties and land held by the Bureau of Land Management.

[12] After extensive debate, Congress determined that the private attorney general model was best suited to ensuring regulatory compliance with the subsistence priority. *See* discussion at pp. 22-23, *infra*.

"Given the choice between federal regulation or self-regulation with federal oversight, Alaska chose the latter. The state enacted the necessary statutes in 1978, while Congress was still working on the final version of ANILCA." Pet. App. A-5.[13] In the wake of the 1980 enactment of ANILCA, the State Joint Boards of Fish and Game developed pertinent regulations which, *inter alia*, defined the term "rural" in its ordinary demographic sense as any area other than a community "with a population of 7,000 or more." *Id.* "In 1982, the Secretary of the Interior certified that the state legislative program was in compliance with ANILCA. Letter from Secretary James Watt to Governor Jay Hammond (May 14, 1982). This certification suspended federal regulation and left the state in charge of implementing ANILCA." *Id.* at A-5 - A-6.

Because the State Boards of Fisheries and Game refused to embrace the subsistence priority, the

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[13] As recently described by the district court, the 1978 State law:

> [R]adically altered the priorities between commercial and sport fisheries on the one hand, and subsistence hunting and fishing on the other hand . . . . The State's subsistence law embodied a major policy trade-off whereby Alaska decided that unified management of fish and game on all public lands (both state and federal) in Alaska by the Alaska Department of Fish and Game was more important to efficient and effective game management in the State of Alaska than was the State's then extant scheme of priorities which in substance and effect placed commercial and sport fishing and hunting above subsistence fishing and hunting in priority.

App. 2a.

State's paper compliance was short lived. Immediately after the certification process was completed, the Joint Boards promptly moved to restrict the subsistence preference in instances where it conflicted with sport and commercial uses. This goal was effectuated by revoking the demographic definition of "rural," grafting a "subsistence community residency requirement" onto ANILCA's rural residency requirement, and then selectively applying the requirement to exclude those subsistence fishing efforts which might interfere with sport and commercial uses. The principal effect of the new regulations was to deny the subsistence priority to members of the Kenaitze Indian Tribe—as well as other rural residents who lived in areas of the State (including the Kenai Peninsula) where the economy of the area is no longer subsistence-based. Pet. App. A-6.

The Board's administrative rewrite of the statute suffered a temporary set-back in 1986 when the Alaska Supreme Court threw out the regulations embodying the "subsistence community" residency requirement on the ground that they were inconsistent with state law. *Madison v. Alaska Dept. of Fish and Game*, 696 P.2d 168 (Alaska 1985). Thereafter, the State legislature amended its subsistence law to overrule the *Madison* decision, essentially adopting the Board's previous criteria for determining eligibility for the subsistence preference. To qualify for the State preference, one must establish residence in rural Alaska *and* residence in a community, the economy of which is subsistence-based. As amended, the State statute provides a subsistence preference only to those rural residents who live in "a community or area of the state in which the noncommercial, customary, and

traditional use of fish or game for personal or family consumption is *a principal characteristic of the economy of the community or area.*" Ch. 52, SLA 1986 at § 11, *codified at* ALASKA STAT. 16.05.940(25) (emphasis added).[14]

Respondent Kenaitze Indian Tribe reacted to passage of the State's amended law by filing this action pursuant to § 807 of ANILCA, 16 U.S.C. § 3117. Its claim is simple. Its members live in an area of Alaska which is unquestionably rural under any common understanding of that term. For centuries they had pursued a way of life sustained entirely by hunting and fishing. Under the express terms of §§ 803 and 804 of ANILCA, their subsistence harvests are entitled to priority over commercial and sport harvests. Yet, because of the State's "subsistence community" residency requirement, they were being denied the subsistence priority solely because of events beyond their control—the presence and influence of a cash economy and culture.

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[14] Despite the fact that Congress had expressly provided that only a State subsistence law passed before 3 December 1982 would be eligible for certification, 16 U.S.C. § 3115(d), the Secretary of the Interior had notified the State in September 1985 that the *Madison* decision put the State out of compliance with ANILCA and had threatened a federal takeover of fish and wildlife management on federal lands. Pet. App. A-6, B-9 - B-10. Following the State legislature's 1986 actions, the State requested that the Secretary certify that its new law restored it to a position of compliance. An Assistant Secretary then wrote a letter to the Governor of Alaska purporting to so certify. *Id.* at A-6-7, B-12. The Court of Appeals correctly concluded that these actions by the Secretary "had no legally operative effect." Pet. App. A-9.

The district court upheld the State's definition of "rural area" as being consistent with ANILCA. Pet. App. B-18 - B-27. The Court of Appeals unanimously reversed. It first determined that the interpretation adopted by the Department of the Interior and the State of Alaska was due no deference. Interpreting the statute's meaning *de novo*, the Court of Appeals found that Congress used the term "rural" in its plain and ordinary sense to refer to areas of Alaska that are "sparsely populated." Pet. App. A-12. It concluded that the State's definition of rural could not be accepted in any case since to do so would "materially change the sweep of the statute . . . and lead to an inconsistency within the statute." *Id.* at A-14. By contrast, the Court found nothing in the Act's structure or its relationship to other statutes which called into question the plain meaning of the term rural. Relying on this Court's admonition in *Amoco Production Company v. Village of Gambell*, 480 U.S. 531 (1987), the lower court refused to resort to the legislative history in search of a mysterious contrary meaning. Concluding that the State's definition of rural was inconsistent with ANILCA, the Court of Appeals remanded the case to the district court for the entry of a preliminary injunction.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly determined that Congress intended the term "rural" in ANILCA to have its plain and ordinary meaning. In accordance with well-established principles of statutory construction, it refused to resort to the Act's legislative history in search of a different meaning, a search that would have proved as futile as it would have been

wasteful. The Court also correctly declined to give deference (though not consideration) to the interpretation of the State and the Secretary of the Interior, against whom this remedial legislation was specifically aimed. Finally, the Court of Appeals' decision does not conflict with any decision of this Court or any other court, nor does it present an issue of any general importance that warrants review by this Court.

I. THIS CASE PRESENTS NO IMPORTANT PRACTICAL OR LEGAL ISSUES

The State alleges that this case presents issues of vital importance to all Alaskans, because by expanding the class eligible for subsistence hunting and fishing, the Court of Appeals' decision significantly dilutes the subsistence protections of ANILCA and harms those rural residents who are economically dependent upon subsistence uses. Cert. Pet. at 10. Also implicated, according to the State, are "profoundly fundamental issues of state and federal authority." These issues allegedly arise because the finding that the State's definition of "rural area" is inconsistent with ANILCA could result in the State losing management responsibility over fish and game on the public lands, resulting in a patchwork system of management responsibility in Alaska between the federal and state governments. Cert. Pet. at 10-11.

The State grossly exaggerates both the practical and the legal consequences of the Court of Appeals' decision. As a practical matter, the decision is of little immediate consequence. It is interlocutory in nature, and merely directs the district court to enter a preliminary injunction which will allow members of the Kenaitze Indian Tribe who live on the Kenai Peninsula—approximately 400 in number—to subsistence

fish pending a final decision on the merits.[15] Historically, the Upper Cook Inlet salmon harvested for subsistence uses has been *de minimus* compared to the modern-day commercial and sport harvests. Extending the statutory priority to the subsistence harvests of Kenaitze tribal members during the pendency of this litigation cannot credibly produce the dire consequences forecast by the State.

Nor can there be long-term consequences which are of great importance. While the lower court decision implicitly rejects the State's restrictive definition of the word "rural," it did not, as the State suggests, dilute the subsistence protections of ANILCA. The very notion that the Court of Appeals has "expanded" subsistence rights contradicts the contention that it has somehow restricted or "diluted" them. Under ANILCA, subsistence uses cannot be restricted until other competing uses have been eliminated. If, after closing all non-subsistence harvests, the State still finds it necessary to restrict the taking of fish or wildlife for subsistence uses, § 804 not only allows—but dictates—that the State limit subsistence uses to those who have a "direct dependence" on those uses. 16 U.S.C. § 3114; Pet. App. A-14. Thus, extending the general priority to all "rural Alaska residents"

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[15] In the district court the State has filed motions to dismiss contesting federal jurisdiction under § 807 and the Eleventh Amendment, challenging plaintiff's standing with respect to salmon fishing, and requesting a remand to the Board of Fisheries to determine whether the Tribe qualifies for "customary and traditional uses" of salmon. By order entered on May 4, 1989, the district court denied these motions and refused to certify its rulings for interlocutory appeal. The court indicated, however, that some aspects of the State's motions went to the merits of the case which have not yet been decided.

does not prevent the State, in times of shortages, from restricting the priority to those subsistence users most dependent upon the resources.

The supposed issue of a conflict between state and federal authority is even more difficult to ascertain. It appears to be premised upon the State's incorrect assertion that the Secretary of the Interior must now step in and take over management of fish and game on the public lands in Alaska because the State's law is no longer consistent with federal law. Such is not the case. Section 805(d) of ANILCA expressly provides that the State may continue to manage fish and wildlife on both federal and state lands *unless and until* the State legislature *repeals* the State's subsistence law. 16 U.S.C. § 3115(d). Although the State is free, as it always has been, to decline to participate in the cooperative federalism program created by Title VIII, absent a repeal of its subsistence law there is no statutory authority for the Secretary to step in and assume management responsibility over fish and game on the public lands.

The courts below have made clear that such a result is entirely in the hands of the State. Pet. App. A-16 n. 8; App. 6a. The Court of Appeals specifically reminded the State of its bargain:

> We do not purport to be directing the state to amend its laws; it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA.

Pet. App. A-16 n. 8. Indeed, the district court has gone the extra mile with the State and given it an-

other opportunity to withdraw from the ANILCA program. App. 9a. Of some interest is the fact that the State, on May 5, 1989, notified the court that it does not intend to withdraw at this time from its role in administering ANILCA.

If the State of Alaska eventually opts out of its role in administering ANILCA, it will be by choice. Unless and until it does so, however, there can be no doubt that the State must accord subsistence harvests of Cook Inlet salmon, small as they are, priority over all other competing uses.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT

Lacking an issue of general importance, or even arguable merit, the State has attempted to manufacture a conflict between the lower court's decision in this case and this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). It claims that the lower court ignored the "methodology" established by this Court "for interpreting statutes," Cert. Pet. at 12, even though the Ninth Circuit "purports to follow that methodology." *Id.*

In reaching its decision, the Court of Appeals relied upon the principles of statutory construction reiterated by this Court, without dissent, in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987)—a case interpreting this very statute. In determining the meaning of the phrase "in Alaska," the Court made clear that:

> When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain

> meaning, that is ordinarily "the end of the matter." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances." *United States v. Locke*, 471 U.S. at 95-96. . .

Amoco Production, 480 U.S. at 552-53.

Applying these principles, the Court of Appeals concluded that the word "rural" has a plain and simple meaning:

> The term rural is not difficult to understand; it is not a term of art. It is a standard word in the English language commonly understood to refer to areas of the country that are sparsely populated. . . . More broadly, rural is the antonym of urban and includes all areas in between cities and towns of a particular size.

Pet. App. A-12 (citations omitted). To argue that the word has no plain meaning, the State seizes upon the fact that the Court of Appeals cited a number of different contexts in which the federal government had used the term rural. Cert. Pet. at 12. Obviously, the Court of Appeals recognized that the definition of rural will vary depending upon its context. The point it made was that in every instance where the federal government has used the term, it has been "consistent with conventional understanding." Pet. App. A-12. The State, on the other hand, failed to cite a single federal statute or regulation in which

the word rural has been used in any sense other than the commonly accepted one. Pet. App. A-13.

Further undermining the merits of the State's argument is the fact that the lower court did not rest its decision entirely upon the fact that "rural" has a plain meaning. It concluded that "[e]ven if the state's interpretation were otherwise permissible, [it] would have to [be] reject[ed] . . . in the name of internal statutory consistency." Pet. App. A-15. This conclusion was based upon the fact that ANILCA "establishes not one but two levels of priority." Pet. App. A-14. In the first tier, "Congress did not limit the benefits of the statute to residents of areas dominated by a subsistence economy. Instead, it wrote broadly, giving the statutory priority to *all* subsistence users residing in rural areas." Pet. App. A-14 (emphasis added). But if the resources are diminished to the point that there are insufficient numbers to satisfy all rural subsistence users, the statute provides a higher priority for those rural residents who can establish that they have a "customary and direct dependence upon the [fish and wildlife] populations as the mainstay of livelihood," live closest to the resources, and have the least access to alternative resources. Pet. App. A-14, *quoting* 16 U.S.C. § 3114. The State's unusual socio-economic definition of "rural" extends the general subsistence priority created by § 803 of ANILCA only to this preferred class of rural Alaska residents, thus rendering the two-tier priority system of § 804 redundant. The Court of Appeals correctly rejected the State's interpretation in favor of one that not only avoids such redundancy, but one that is also more protective.

The Court of Appeals was thus scrupulously faithful to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1504 (1989). But despite the fact that the term rural has a commonly understood meaning which is consistent with and furthers ANILCA's purpose and structure, the State maintains that the judges below erred in not considering the legislative history. Recognizing that legislative history "cannot overcome the structural and semantic problems" with the State's definition of "rural," Pet. App. A-15, however, the Court of Appeals correctly refused the gambit. Manifestly, this is not one of those " 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1031 (1989), *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Even had the Court of Appeals jumped at the State's straw man, it would have landed at the same spot. The legislative history defies the State's assertion that Congress used the term "rural" in anything other than its ordinary sense. In contending that Congress intended rural to refer to "subsistence communities," the State cites a single excerpt from a Senate Committee Report which contrasts "cities" with rural communities in Alaska. Cert. Pet. at 16, *relying upon* S. REP. NO. 96-413, 96th Cong., 1st Sess. 233 (1979), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5070, 5177. By contrasting the State's largest cities with various rural communities, this his-

tory actually supports the Court of Appeals' conclusion that Congress used the term rural in its usual demographic sense. Since cities are areas with relatively high populations and population densities, Congress obviously considered "rural" areas to be those regions with relatively small populations and low population densities.[16] In connection with the need for legislation to protect subsistence uses in rural Alaska, Congress referenced again and again the fact that subsistences uses were being threatened by the rapid "population growth" of the State's urban centers. 16 U.S.C. § 3111(3); *accord, e.g.*, H.R. REP. NO. 96-97, Part I, 96th Cong., 1st Sess. 278 (1979).

Finally, ANILCA's legislative history reveals that Congress expressly rejected the economically-oriented approach to the allocation of the subsistence preference exemplified by the State's definition of rural. Rather than conditioning the priority upon the degree to which an individual was able to participate in the

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[16] In every instance where Congress identified those areas it considered "urban," it referred to the State's four most populous cities. *See, e.g.*, S. REP. NO. 96-413, *supra* n. 10, at 233; H.R. REP. NO. 96-97, Part I, 96th Cong., 1st Sess. 278 (1979); 125 CONG. REC. 11,426 (1979) (Congressman McCloskey). It never once identified any community on the Kenai Peninsula as "urban." In fact, by referencing the intended beneficiaries of the Act as the "more than two hundred Native Villages scattered throughout rural Alaska," 126 CONG. REC. 29,278 (1980), ANILCA's legislative history demonstrates that Congress in fact considered the Kenai Peninsula to be rural. Congress referred to the Native villages whose land claims were extinguished by the Alaska Native Claims Settlement Act. 43 U.S.C. § 1610(a)(2)(3). A number of Native villages located on the Kenai Peninsula are included in that list, including Ninilchik, English Bay, Port Graham, Salamatof, Seldovia and Tyonek.

cash economy, Congress chose instead to preserve an individual's right to choose whether to pursue a subsistence lifeway or lifestyle. *See, e.g.*, H.R. REP. NO. 95-1045, Part I, 95th Cong., 2d Sess. 187 (1978) ("Furnishing protection of subsistence patterns of existence will allow Native peoples . . . the opportunity to [decide for themselves the rate at which acculturation will take place]"); 126 CONG. REC. 29,279 (1980) (the Act is intended to allow Alaska Natives "to choose for themselves the direction and pace, if any, of the evolution of their own culture"). Congress fully expected that many rural residents would live in areas of the State where the prevailing economy was *not* subsistence based. Indeed, Congress made clear that economic factors were *not* to be determinative of a person's eligibility for the subsistence preference by rejecting all proposals which would have employed income requirements. *See, e.g*, 126 CONG. REC. 29,279 (1980) (Congressman Udall) (Congressional "policy also requires that regulatory systems which employ income requirements not be imposed upon rural residents").[17]

III. THE SECRETARY'S "CONSISTENCY DETERMINATION" IS DUE NO DEFERENCE UNDER PRINCIPLES OF STATUTORY CONSTRUCTION OR THE SEPARATION OF POWERS DOCTRINE

The State's final argument is that by refusing to defer to the Secretary of the Interior's consistency

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[17] *See, e.g., Transcript of Proceedings, Hearing on H.R. 39, Alaska National Interest Lands Conservation Act, Held Before the Subcommittee on General Oversight and Alaska Lands of the Committee on Interior and Insular Affairs*, 95th Cong., 2d Sess. 799 (Jan. 30, 1978) (Congressman Sloss speaking to the proposed definition of "subsistence uses" in H.R. 39 stated that it contained nothing "which would prevent subsistence users from taking part in the cash flow economy as well").

determination, the Court of Appeals violated the statutory construction principles established by this Court, as well as the constitutional separation of powers doctrine. Cert. Pet. at 17-18. As an initial matter, the canon of construction which provides that courts should show deference to an administrative agency's construction of a statute has no application in this case since the intent of Congress is clear from the language and structure of the Act. *See Amoco Production Co.*, 480 U.S. at 552-53, *quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). A fundamental principle of statutory construction is that a plain and unambiguous statutory command cannot be rendered ambiguous by a contrary administrative interpretation. *Morton v. Ruiz*, 415 U.S. 199, 236-37 (1974).

Equally fundamental is the principle that deference is due an administrative agency's construction of a statute only when it is entrusted with the administration of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Blum v. Bacon*, 457 U.S. 132, 141 (1982). Congress did not entrust the Secretary, who was an equally targeted wrongdoer in the erosion of Native subsistence rights, with the administration of §§ 803 and 804 of ANILCA. Instead, it gave the Secretary a limited role in the interpretation and enforcement of the subsistence preference: the role of certification of the State's subsistence law in 1982, and of monitoring and reporting to Congress thereafter. 16 U.S.C. §§ 3115, 3116, 3123; Pet. App. A-9. Since the Secretary's "recertification" of the State's 1986 subsistence law exceeded his statutory authority, the Court of Appeals correctly refused to give deference

to the interpretation embodied in that determination. Pet. App. A-9.

Section 805 provides the basic structure for implementation of the priorities created by sections 803 and 804. 16 U.S.C. § 3115. Section 807 provides the means by which the preference is enforced. 16 U.S.C. § 3117. Together these provisions allowed the State of Alaska to assume responsibility for fish and game management on federal lands and waters in Alaska if, *within one year* of the passage of Title VIII, the State enacted and implemented "laws of general applicability which [were] consistent with, and which provide[d] for the definition, preference and participation specified in sections 803, 804 and 805." 16 U.S.C. § 3115(d). Once the State enacted such laws, and the Secretary certified the State to assume management authority, the Secretary's role in the *enforcement* of the preference was at an end. His role thereafter was limited to monitoring the State's compliance and reporting to Congress. *See* 16 U.S.C. §§ 3116 and 3123. Absent a repeal of the State's subsistence laws, 16 U.S.C. § 3115(d), there is no statutory authority for the Secretary to rescind his certification of the State's subsistence management program and take over management of wildlife on the public lands in Alaska. If the preference is not being respected, enforcement lies in the hands of private attorneys general and the federal courts, 16 U.S.C. § 3117,[18] as the Ninth Circuit correctly held. Pet. App. A-9.

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[18] The Deputy Undersecretary for the Department of Interior acknowledged this fact in testimony before the Joint Boards of Fisheries and Game in 1982, when he stated: "There is no provision for federal administrative takeover of the program once it's approved." *Testimony of William Horn, Deputy Undersec-*

The legislative history of sections 805 and 807 demonstrates that Congress expressly rejected proposals which would have given the Secretary authority to recertify the 1986 State subsistence law. Initial drafts of section 807 of ANILCA gave Interior the authority to regulate the State's implementation of the subsistence preference.[19] As the bill evolved, Congress eventually took away the Secretary's authority to suspend his approval of the State's law and limited his regulatory authority to filing suit in federal court to require the State to take such actions as were necessary to provide for the subsistence priority. H.R. 39, 96th Cong., 1st Sess., § 707 (1979), *discussed in* H.R. REP. NO. 96-97, Part II, 96th Cong., 1st Sess. at 196. Congress ultimately rejected even this form of administrative enforcement in favor of the present private attorney general model embodied in § 807 of ANILCA.[20] As enacted, § 807 of ANILCA delegates

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retary, Department of the Interior, Before Joint Meeting of the Boards of Fish and Game (April 5, 1982) (CR 29, Attachment 1 at 19-20).

[19] The first drafts provided that if the State was not respecting the federal subsistence priority, the Secretary was to "notify the State and . . . indicate changes in [the] program or its implementation [required] to bring the State into compliance." H.R. 39, 95th Cong., 2d Sess. § 705 (1978), *reprinted in* H.R. REP. NO. 95-1045, Part I, 95th Cong., 2d Sess. 30 (1978). If the State failed to make the changes indicated, the Secretary was given the authority to issue an interim suspension of the certificate of approval. After an opportunity to appeal, the Secretary was authorized to "issue a final suspension of the certification . . . and assume . . . responsibility for regulating the taking of fish and wildlife for subsistence uses on the public lands . . . ." *Id.*

[20] Congress rejected the administrative enforcement model proposed in 1978 largely at the behest of the State, which sought to insure that Interior played no role in actively enforcing the

all authority for interpreting and enforcing the subsistence preference to the federal courts. 16 U.S.C. § 3117(a).

Finally, an important aspect of a federal court's role in checking the power of its sister branches of government is its review of Executive branch actions to insure that they comply with constitutionally imposed legislative commands. Since there was no legislative authority for the Secretary's recertification of the State's compliance with ANILCA, the lower court's refusal to give deference to the Secretary's "consistency determination" is fully consistent with its constitutional duty to maintain the separation of federal powers envisioned by the Constitution.

CONCLUSION

This case was correctly decided below, and it presents no substantial questions of federal law or any other matter of sufficient importance to warrant this Court's consideration. Accordingly, the petition for a writ of certiorari should be denied.

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subsistence preference. The State believed that Interior's involvement would subject subsistence users to "illusory protection from arbitrary administrative determinations." 126 CONG. REC. 31,110 (1980) (Sen. Stevens). The State also objected to the 1979 version which called for the Secretary to file suit on behalf of aggrieved subsistence users, citing "the difficult nature of its relationship with the Federal government which could result from the use of section 807, and the resultant damage to the traditional State-Federal and wildlife management relationship." *Id.*

Respectfully submitted,

CAROL H. DANIEL
TRED R. EYERLY
WILLIAM E. CALDWELL

Alaska Legal Services Corporation
1016 West Sixth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-6282

Attorneys for Respondent

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

No.A86-367 Civil

KENAITZE INDIAN TRIBE,

Plaintiff,

vs.

STATE OF ALASKA,

Defendant.

PRELIMINARY INJUNCTION

Introduction

By order filed July 9, 1987, the court granted defendant State of Alaska's motion for summary judgment whereby the court determined that there was no inconsistency between Alaska's subsistence statute, AS 16.05.258, and relevant definitions, such as AS 16.05.940(25), and the provisions of the Alaska National Interest Lands Conservation Act (ANILCA). Plaintiff appealed. On October 28, 1988, the Ninth Circuit Court of Appeals filed its opinion which reversed the foregoing order and remanded the case to this court "for entry of a preliminary injunction." Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312, 318 (9th Cir. 1988). In a concurring opinion, two of the three-judge panel joined in holding that plaintiff:

> [I]s entitled to an injunction providing that subsistence uses of fish by members of the Tribe

> shall be given a priority by the state over all other uses so far as necessary as to preserve the subsistence uses of such users. 16 U.S.C. § 3114.

Id. at 321.

The State of Alaska sought rehearing before the Ninth Circuit Court of Appeals which was denied. The State of Alaska has also petitioned the United States Supreme Court for a writ of *certiorari*, which application is still pending. No stay has been granted by any court as regards the mandate of the court of appeals which was received by this court on or about March 1, 1989.

Being in some doubt as to exactly how best to formulate the preliminary injunction which it was directed to enter, the court called upon the parties to confer with one another and to present their joint or respective positions as regards a preliminary injunction to the court. The latter process has now been completed. The court has before it two suggested forms of preliminary injunction which are vastly different.

Discussion

In 1978, the legislature of the State of Alaska made a policy decision by enacting a subsistence statute which radically altered the priorities between commercial and sport fisheries on the one hand, and subsistence hunting and fishing on the other hand. Ch. 151, SLA 1978. The State's subsistence law embodied a major policy trade-off whereby Alaska decided that unified management of fish and game on all public lands (both state and federal) in Alaska by the Alaska Department of Fish & Game was more important to efficient and effective game management in the State of Alaska than was the State's then extant scheme of priorities which in substance and effect placed commercial and sport fishing and hunting above subsistence fishing and hunting in priority. Indeed, the

latter was substantially ignored by the State of Alaska for many years.

In 1986, as a result of a decision of the Alaska Supreme Court in *Madison v. Alaska Dept. of Fish & Game,* 696 P.2d 168 (Alaska 1985), the Alaska legislature again considered this subject and again enacted a statute, the purpose of which was to afford to subsistence hunters and fishermen priority as regards the use of fish and game over other consumptive uses of fish and game. Ch. 52, SLA 1986; AS 16.05.258.

By its decision in *Kenaitze,* the Ninth Circuit Court of Appeals has determined that Alaska's current subsistence program is not consistent with ANILCA. The focal point of this decision is the State's definition of the term "rural area". The appellate court has determined that the State has selected a definition:

> [T]hat excludes most areas normally understood to be covered by the term [rural]. As Alaska defines the word, an area is rural only if its economy is dominated by subsistence fishing and hunting; it excludes areas characterized primarily by a cash economy, even though a substantial portion of the residents may engage in subsistence activities.

Kenaitze, 860 F.2d at 316.

In the absence of any definition of the term "rural" in ANILCA, the court of appeals has supplied a definition:

> [A]reas of the country that are sparsely populated, where the economy centers on agriculture or ranching. *See* Webster's Third New International Dictionary 1990 (1981). More broadly, rural is the antonym of urban and includes all areas in between cities and towns of a particular size. *See id.*

Id. at 316-17. For the sake of completeness here, we note that the State's current subsistence statute defines "rural area" to mean:

> [A] community or area of the state in which the noncommercial, customary, and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy of the community or area.

AS 16.05.940(25) (emphasis supplied).

It is in the foregoing context that the court has been ordered to enter a preliminary injunction in favor of plaintiff.

The general thrust of the State's proposed preliminary injunction is as follows:

> [Require the State] by May 15, 1990, to either demonstrate to this court that its laws of general applicability are consistent with ANILCA, or, in the words of the Ninth Circuit, to advise "the Department of the Interior that it is withdrawing from its role in administering ANILCA."

State's Suggested Preliminary Injunction at 1. The State's suggestion in substance urges the court to defer entering the preliminary injunction which the court of appeals has ordered for a period of one year. The State no doubt envisions that it might use the one-year period both to obtain a ruling from the United States Supreme Court and, if unsuccessful there, to call upon the State legislature to reconsider and/or reinact its subsistence law. In this regard, the State urges that it not be "stampeded . . . into a position where it must notify the Secretary [of the Interior that] it is withdrawing from ANILCA . . . ." *Id.* at 2.

The State asks too much. The State has known of the decision of the Ninth Circuit Court of Appeals in this

matter since shortly after October 24, 1988. The Alaska State Legislature has been in session since January 9, 1989, and will presumably adjourn on or about May 9, 1989. The State of Alaska has had ample opportunity to contemplate the difficulties and the choices which follow the reversal of this court's initial decision. The State has apparently chosen to gamble on judicial relief before the United States Supreme Court. Hopefully, however, the State of Alaska has some undisclosed contingency plan; for, as discussed herein, this district court's hand is controlled at this juncture not by the balancing of hardships or consideration of public policy matters, but by the mandate of the Ninth Circuit Court of Appeals. A presently meaningful preliminary injunction in plaintiff's favor must be entered.

Before discussing the plaintiff's proposed preliminary injunction, a further word needs to be said about several aspects of the State's presentation and arguments.

Firstly, the State has argued at some length that plaintiff has other options for the taking of fish during the 1989 season. It also argues that severe economic disruption will result from a change in the *status quo*, and that any disruption of the *status quo* will unleash tensions and animosity between sport and subsistence users of Kenai Peninsula fish resources.

As has already been suggested, the decision of the Ninth Circuit Court of Appeals leaves no room for these arguments. More generally, however, the State's argument that the plaintiff has other options is unavailing because equal access to fish resources through sport fishing and personal use permits is simply not the equivalent of the priority over other applications of fish resources which both state and federal law have mandated for subsistence uses.

As regards the economic and emotional consequences of the court's action, the State's arguments are equally unavailing. Over ten years ago, the legislature of the State

of Alaska elected to afford subsistence users of fish first priority. For many years, little was done to effect that priority, and it is the State of Alaska, its legislators, and its game mangers who must now face the consequences of their decisions and in particular the reluctance of regulators to effectively deal with the subsistence priority. The State's arguments of severe economic consequences to those dependent upon the sport fishery on the Kenai Peninsula for their livelihood are, in a way, proof of the Ninth Circuit's accusation that the State's priorities have not been where they should have been under both state and federal law. The court has great sympathy for the people who will be impacted by this late change in the rules for subsistence fishing; but neither the Ninth Circuit Court of Appeals nor this court has any power whatsoever to alter the course of this matter. The choice was in the first instance and is today entirely up to the State of Alaska. Just as was done in 1978, the State and its game managers must decide whether unified management of fish and game on all public lands, both state and federal, in the State of Alaska is worth the price of affording priority above other consumptive uses to subsistence uses of fish and game.

Secondly, the State has filed a flurry of new motions, including a further challenge to this court's jurisdiction and a further challenge of the plaintiff's standing to sue. These motions have the appearance of being tardy, repetitious, dilatory, and, on a preliminary review, substantially without merit. Plaintiff seeks to stay the court's consideration of these motions. The court sees no reason to do so, and plaintiff's motion for stay is denied. The court has received opposition to these motions and will rule upon the same in due course.

Thirdly, the State takes the position that it cannot "adopt regulations consistent with the state laws from which they derive their authority which the Ninth Circuit believes would be consistent with ANILCA." *State's Sug-*

gested Preliminary Injunction at 8. The court takes the latter observation to mean that it is the State's view that it cannot adopt regulations consistent with both extant state subsistence law and ANILCA. The State should reexamine its view of this matter. While the court is obviously without the benefit of any briefing on this subject, the court is not convinced that it would be impossible for the Board of Fisheries to adopt regulations which would harmonize the state law definition of "rural area" and the Ninth Circuit's definition of the term "rural". AS 16.05.940(25); *Kenaitze*, 860 F.2d at 316-17. Use of the article "a" preceding the term "principal characteristic of the economy" (rather than the article "the") in AS 16.05.940(25) could, in the court's view, make a critical difference in the susceptibility of the State's definition of rural area to being harmonized with the Ninth Circuit's definition of that term. In short, the court is of a view that the Board of Fisheries should consider—if it has not already done so—whether it can scrap the regulatory past which led to the Ninth Circuit's decision herein in favor of an application of AS 16.05.940(25) which would not be offensive to the concept of rural areas being those "in between cities and towns of a particular size." *Kenaitze*, 860 F.2d at 317.

Fourthly, the State on several occasions in connection with its proposed preliminary injunction suggests that the court may ultimately find it necessary to enter some order to the Secretary of the Interior. Although it is clear that the Secretary might have been joined in this case as a party, this has not happened. ANILCA § 807(a); 16 U.S.C. § 3117(a). The court does not perceive that it can order a non-party to take any action.[1]

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[1] The State should not take this observation as an invitation or suggestion that the Secretary should be added, at this late date, as a party to this case.

Plaintiff has also filed a proposed preliminary injunction as requested by the court. Plaintiff's proposal is in a sense at the opposite pole from that of the State of Alaska. Whereas the State's proposal would have this court in substance maintain the *status quo* for a year, plaintiff's suggested form of preliminary injunction is comprehensive and replete with fine detail aimed at establishing a subsistence fishery for plaintiff on the Kenai Peninsula. Plaintiff's proposal is highly intrusive due to its detail. Plaintiff would have this court make the decisions that the State of Alaska should be making. This court has neither the expertise nor the experience in fisheries management which is available to the State through the Department of Fish & Game. The court views plaintiff's effort as a responsible one; but the court is simply not in a position—especially given the need for speedy action[2]—to seek and obtain expert advice as to the appropriateness of plaintiff's proposal. The State of Alaska (presumably the Department of Fish & Game with the advice of its attorneys) can and should make the choice between continuing the present policy of unified management of state and federal lands with its concomitant requirement that plaintiff's putative subsistence rights be effected on an interim basis, and abandonment of that policy in favor of separate state and federal game management and the differing priorities as to state lands which will then be possible as between commercial and sport fisheries on the one hand and subsistence fisheries on the other hand.

Plaintiff's proposal for preliminary injunction includes an extensive discussion of plaintiff's view of its customary and traditional use of fish. This discussion goes to the merits of an important aspect of this case which has not yet been reached. As discussed above, the only matter now before this court is the entry of a preliminary injunction

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[2] The 1989 salmon fishing season will commence on the Kenai Peninsula in late May or early June.

in furtherance of the mandate of the Ninth Circuit Court of Appeals that the plaintiff's purported subsistence fishing rights be afforded priority over other consumptive uses pending the ultimate decision in the case. Accordingly, the court has no need to deal with the "customary and traditional use" issue except to find plaintiff's showing of customary and traditional use of hooligan and all species of salmon which are prevalent on the Kenai Peninsula is sufficient for purposes of a preliminary injunction.

Preliminary Injunction

The State of Alaska is hereby ordered to elect, on or before May 15, 1989, whether it will or will not afford plaintiff on an interim basis priority over all other consumptive uses for the subsistence use of hooligan and all species of salmon on the Kenai Peninsula.

If the State of Alaska elects to continue its efforts to comply with ANILCA, the State is ordered and enjoined to afford members of plaintiff tribe who reside in rural areas a priority, over all other consumptive uses, for the subsistence use of hooligan and all species of salmon on the Kenai Peninsula; and, to that end, the Board of Fisheries shall, on or before May 30, 1989, adopt emergency regulations to effect such priority. If such regulations are adopted, the regulations and the findings which support them shall be served upon plaintiff and filed with this court on or before May 30, 1989, for review as contemplated by ANILCA § 807(a). 16 U.S.C. § 3117. In the alternative, the State of Alaska and plaintiff may choose to enter into and file with the court for its approval, on or before May 30, 1989, a consent preliminary injunction to the same general effect as this court's foregoing injunctive order.

If the State of Alaska elects not to continue its efforts to comply with ANILCA, the State of Alaska shall so inform the Secretary of the Interior on or before May 15, 1989.

DATED at Anchorage, Alaska, this 25th day of April, 1989.

/s/ H. Russell Holland
United States District Judge

APPENDIX B

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

Section 102, 16 U.S.C. § 3102

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act, and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after the date of enactment of this Act.

(3) The term "public lands" means land situated in Alaska which, after the date of enactment of this Act, are Federal lands, except—

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act.

Section 801, 16 U.S.C. § 3111

The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and

non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

Section 802, 16 U.S.C. § 3112

It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purposes of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and

(3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

Section 803, 16 U.S.C. § 3113

As used in this Act, the term "subsistence uses" means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft

articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade. For the purposes of this section, the term—

(1) "family" means all persons related by blood, marriage, or adoption, or any person living within the household on a permanent basis; and

(2) "barter" means the exchange of fish and wildlife or their parts, taken for subsistence uses—

(A) for other fish or game or their parts; or

(B) for other food or for nonedible items other than money if the exchange is of a limited and noncommercial nature.

Section 804, 16 U.S.C. § 3114

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the applications of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

Section 805, 16 U.S.C. § 3115

(a) Establishment of subsistence resources regions, local advisory committees, and regional advisory councils;

membership, duties, and authority of regional advisory councils. Except as otherwise provided in subsection (d) of this section, one year after the date of enactment of this Act, the Secretary in consultation with the State shall establish—

(1) at least six Alaska subsistence resource regions which, taken together, include all public lands. The number and boundaries of the regions shall be sufficient to assure that regional differences in subsistence uses are adequately accommodated;

(2) such local advisory committees within each region as he finds necessary at such time as he may determine, after notice and hearing, that the existing State fish and game advisory committees do not adequately perform the functions of the local committee system set forth in paragraph (3)(D)(iv) of this subsection; and

(3) a regional advisory council in each subsistence resource region.

Each regional advisory council shall be composed of residents of the region and shall have the following authority;

(A) the review and evaluation of proposals for regulations, policies, management plans, and other matters relating to subsistence uses of fish and wildlife within the region;

(B) the provision of a forum for the expression of opinions and recommendations by persons interested in any matter related to the subsistence uses of fish and wildlife within the region;

(C) the encouragement of local and regional participation pursuant to the provisions of this title in the decision-making process affecting the taking of fish and wildlife of the public lands within the region for subsistence uses;

(D) the preparation of an annual report to the Secretary which shall contain—

(i) an identification of current and anticipated subsistence uses of fish and wildlife populations within the region;

(ii) an evaluation of current and anticipated subsistence needs for fish and wildlife populations within the region;

(iii) a recommended strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs; and

(iv) recommendations concerning policies, standards, guidelines, and regulations to implement the strategy. The State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of this subsection may provide advice to, and assist, the regional advisory councils in carrying out the functions set forth in this paragraph.

(b) Assignment of staff and distribution of data. The Secretary shall assign adequate qualified staff to the regional advisory councils and make timely distribution of all available relevant technical and scientific support data to the regional advisory councils and the State fish and game advisory committees or such local advisory committees as the Secretary may establish pursuant to paragraph (2) of subsection (a).

(c) Consideration of reports and recommendations of regional advisory councils. The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted

by the Secretary, he shall set forth the factual basis and the reasons for his decisions.

(d) Supersedure by enactment and implementation of State laws governing State responsibility; consideration of recommendations by State rulemaking authority. The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year for the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805 , such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses. Laws establishing a system of local advisory committees and regional advisory councils consistent with section 805 [this section] shall provide that the State rulemaking authority shall consider the advice and recommendations of the regional councils concerning the taking of fish and wildlife populations on public lands within their respective regions for subsistence uses. The regional councils may present recommendations, and the evidence upon which such recommendations are based, to the State rulemaking authority during the course of the administrative proceedings of such authority. The State rulemaking authority may choose not to follow any recommendation which it determines is not supported by substantial evidence presented during the course of its administrative proceedings, violates recognized principles of fish and wildlife conservation or would be detrimental to the satisfaction of rural subsistence needs. If a recommendation is not adopted by the State rulemaking authority, such authority shall set forth the factual basis and the reasons for its decision.

(e) Reimbursement to State; limitation; report to Congress. (1) The Secretary shall reimburse the State, from funds appropriated to the Department of the Interior for

such purposes, for reasonable costs relating to the establishment and operation of the regional advisory councils established by the State in accordance with subsection (d) and the operation of the State fish and game advisory committees so long as such committees are not superseded by the Secretary pursuant to paragraph (2) of subsection (a). Such reimbursement may not exceed 50 per centum of such costs in any fiscal year. Such costs shall be verified in a statement which the Secretary determines to be adequate and accurate. Sums paid under this subsection shall be in addition to any grants, payments, or other sums to which the State is entitled from appropriations to the Department of the Interior.

(2) Total payments to the State under this subsection shall not exceed the sum of $5,000,000 in any one fiscal year. The Secretary shall advise the Congress at least once in every five years as to whether or not the maximum payments specified in this subsection are adequate to ensure the effectiveness of the program established by the State to provide the preference for subsistence uses of fish and wildlife set forth in section 804.

Section 807, 16 U.S.C. § 3117

(a) Exhaustion of administrative remedies; civil action; parties; preliminary injunctive relief; other relief; costs and attorney's fees. Local residents and other persons and organizations aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d) may, upon exhaustion of any State of Federal (as appropriate) administrative remedies which may be available, file a civil action in the United States District Court for the District of Alaska to require such actions to be taken as are necessary to provide for the priority. In a civil action filed against the State, the Secretary may

be joined as a party to such action. The court may grant preliminary injunctive relief in any civil action if the granting of such relief is appropriate under the facts upon which the action is based. No order granting preliminary relief shall be issued until after an opportunity for hearing. In a civil action filed against the State, the court shall provide relief, other than preliminary relief, by directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue. Local residents and other persons and organizations who are prevailing parties in an action filed pursuant to this section shall be awarded their costs and attorney's fees.

(b) Priority (repealed). A civil action filed pursuant to this section shall be assigned for hearing at the earliest possible date, shall take precedence over other matters pending on the docket of the United States district court at that time, and shall be expedited in every way by such court and any appellate court.

(c) Section as sole Federal judicial remedy. This section is the sole Federal judicial remedy created by this title for local residents and other residents who, and organizations which, are aggrieved by a failure of the State to provide for the priority of subsistence uses set forth in section 804.